IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 09-6291

WENONA BURTON,

Plaintiff-Appellant,

v.

NOBLE ENERGY, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Oklahoma

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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STATEMENT OF INTEREST

The Equal Employment Opportunity Commission is the agency charged by Congress with administering, interpreting and enforcing Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e et seq. ("Title VII"), and other federal employment discrimination laws. This appeal raises questions about the affirmative defense to harassment claims set forth in Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998), and Burlington Industries v. Ellerth, 524 U.S. 742, 765 (1998), as well as about the timing and scope of a charge of

discrimination in harassment cases. The district court held that defendant established its affirmative defense despite evidence that plaintiff complained about the harassment, to no avail, to three managers. The court also held that plaintiff failed to "exhaust her administrative remedies" on her harassment claim, despite evidence of a timely-filed "unperfected" charge. These and related rulings, if upheld, could undermine the Commission's efforts to enforce Title VII. We therefore offer our views to this Court.

STATEMENT OF THE ISSUES

1. Whether the district court erred in holding that defendant carried its heavy burden of proving an affirmative defense under Faragher/Ellerth where there was uncontradicted evidence that no remedial action was taken in response to plaintiff's multiple complaints about the sexual harassment.

2. Whether the district court erred in holding that plaintiff failed to exhaust her administrative remedies with respect her harassment claim where she filed an "unperfected charge" within 300 days of the last act of harassment.

3. Whether the district court erred in holding that plaintiff failed to show that any incidents of harassment within the charge-filing period were sufficiently related in type, frequency and perpetrator to incidents occurring outside that period so that all of the incidents could be considered part of a single "unlawful employment practice."

STATEMENT OF THE CASE

1. Nature of the Case and Course of Proceedings

This is an appeal from a final judgment of the district court dismissing this suit under Title VII and state law. Plaintiff alleges that she was subjected to sexual harassment by a high-level manager that defendant did not promptly remedy and to retaliation once defendant did respond to the alleged harassment. The district court granted summary judgment, holding that defendant established both prongs of its Faragher/Ellerth affirmative defense to the harassment, that plaintiff did not file a timely charge challenging the harassment, and that there is insufficient evidence to support a finding of unlawful retaliation.

2. Statement of Facts

Wenona Burton worked as a production assistant in the Velma, Oklahoma, office of Noble Energy, Inc. ("NEI"), an independent producer and marketer of oil and natural gas. She alleges that she was sexually harassed by Mack Duckworth, a high-level manager based in Denver,[1] beginning in the late fall of 2005 and continuing until he left the company in November 2006. Among other things, Duckworth, on numerous occasions, asked Burton what color lipstick or underwear or what type of perfume she was wearing. See, e.g., Appellant's Appendix,

[1] Duckworth's job title is unclear, but he is described as "two tiers up from the district manager." v2: 407; see also id. at 372 (district manager's "boss's boss").

volume II ("v2"): 364-66, 371, 380 (adding, "it was constant . . . all the time"). Sometimes, if she objected or did not respond, he would say, "I'm the boss, so, you know, I'm allowed to know that." v2: 371. He also told her about his sex life, made other sexual comments, and urged her to divorce her husband and run away with him. See, e.g., id. at 378-81, 383. When she indicated that his comments were inappropriate, he responded, for example, "I'm the boss"; "when the boss is talking, you're not supposed . . . to interrupt." v2: 381.

Burton also testified that, during the company Christmas party in December 2005, Duckworth caressed her knee; when she asked what he was doing, he responded that he thought it was his knee. v2: 368-70. In addition, whenever he came to the Velma office, he would subject Burton and a coworker, Suzi Layn, to long, caressing hugs. See, e.g., v2: 367, 370-71, 376-77. According to Burton, "you had to shove him off of you in order for him to stop." Id. at 370-71; see also id. at 400 ("[H]e was very open about hugging or flirting or – very, you know, inappropriate. . . . I would have to tell him, 'Stop. Don't. That's enough. Quit. That's enough hugging.'"). At least once, when she sat down behind her desk to avoid hugging Duckworth, he came up behind her and pulled her head against his abdomen, stroking her hair. Id. at 377-78. Another time, he came to a large group meeting and hugged Burton openly and caressingly in front of the entire office

including Burton's husband and a Denver-based HR employee, Anna Rodriguez. v2: 376-77.

NEI has a comprehensive Company Code of Business Conduct and Ethics addressing issues such as conflicts of interest, insider trading, and antitrust compliance, and prohibiting harassment and discrimination. See Volume I ("v1"): 200-64; see id. at 216 (nonharassment policy). The Code states that employees "are responsible" for "reporting" any behavior that is "illegal, unethical, or otherwise violative of the Code" to "appropriate personnel." v1: 205. In addition, the Code lists a toll-free number where all such behavior could be reported. Id. at 259. There was no special procedure for harassment or discrimination complaints. Burton testified that the "procedure was hazy to all of us." v1: 152.

Burton alleges that, shortly after Duckworth's harassment began, she complained about the conduct to her immediate supervisor, Kim Rowell, as well as to the district manager, Steve Wendte. v2: 369-73, 392-93. At Rowell's direction, she also complained to Pat Beck, the accounting manager. Id. at 392-93. Despite these complaints, the conduct continued, and there is no evidence that any efforts were made to stop it. Burton testified that, when she asked Wendte whether he would inform HR about the problem, he responded that he would, but that "it was difficult to handle that situation because [Duckworth] was his boss's boss. And that's about as far as it went." v2: 372.

In March 2006, Burton complained to HR employee Anna Rodriguez that Rowell was bothering her and had grabbed Burton's arm, causing a bruise. v1: 121-22. Rowell was then fired, and Duckworth began supervising Burton and Layn directly. v1: 150-51. As a result, he visited Velma more frequently, often accompanied by Rodriguez. v2: 370-71. At one point, based on his behavior with and about Rodriguez, Layn asked Duckworth whether they were having an affair; Duckworth responded by raising his eyebrows. v1: 153-55.

Burton testified that, although the harassment was ongoing, "the main day" occurred on September 12, 2006. v1: 134. After arriving in Velma, Duckworth asked where he could buy marijuana and kept suggesting that Burton should leave her husband. v1: 134. When she asked, "are you high?", he responded "high on love." Id. He then told Burton, Layn, and another female employee that they needed to have a "team-building field trip" by going to a restaurant for a drink. Id. (stating "I'm the boss, so we can do whatever we want to"). En route, Duckworth offered Burton money to suck her lips and repeatedly touched her knee and hand, stating "I just love to touch you," even though he was driving and she was in the back seat. v1: 134-36. He also suggested that he, Burton, and Layn have "group sex" at a motel. Id. at 135. Throughout the encounter, he asked questions about the women's sex lives, commented about his own, and made various sexual comments about Anna Rodriguez. Id. at 136-37. After a time, Burton stated that

she needed to leave to attend her son's football game. To her chagrin, Duckworth decided to attend the game, too, stating, "as your boss, I should know everything about you and . . . your family." v1: 137-38.

At the game, Duckworth sat in the stands directly in front of Burton and her husband and proceeded to caress Burton's leg and shove his elbow into her "private area," telling her that he wanted to have sex with her right then and there, and commenting on other spectators and the cheerleaders. v1: 138-41. Finally, Burton got up and moved away. Id. at 141.

After this incident, Duckworth continued flirting with Burton by phone, text-message and email. See v2: 387. Finally, when he came to Velma for her evaluation, she told him that, if he did not stop, she was going to report him to HR. He started crying, saying that that would ruin his life and hers because they would both get fired. Id. at 387-88. Even after that, he called to tell her he could not stay away from her and that he "had the power to do whatever he wanted to do." v2: 389. He also continued hugging Burton when he saw her. Id. at 389-400. As a result of the harassment, Burton became very stressed, and missed work due to "stomach issues." v2: 401 (stating that she was "very upset," "very scared," "at wits end").

In late October or early November, Danny Ray, a consultant engineer, came into Burton's office and asked what she had done to become "Mack Duckworth's

pet." v1: 160. She burst into tears and told him about the harassment. Id. at 160-61. Ray subsequently wrote to the company president to complain on Burton's behalf. Id. at 161-62. The president forwarded the complaint to the head of HR, Lee Robison. Id. at 162-63. When Robison contacted Duckworth to begin an investigation, Duckworth told her he was leaving. On November 10, 2006, he went out on FMLA leave and never returned. v1: 167; v1: 279 (Robison Decl. ¶ 10).

On July 27, 2007, Burton filed an Intake Questionnaire with EEOC's Oklahoma Area Office. v1: 298-301. In response, she was sent a letter, noting that her "proposed charge" had been assigned to an investigator for processing. v1: 303. On August 8, the Commission sent NEI a Notice of Charge of Discrimination stating that an "unperfected" Title VII charge, which the Commission was "working to perfect," had been filed against the company and specifying that NEI need not take any action at that time. v1: 292; see also id. at 283 (investigator's log); v1: 72 (Def's MSJ, Statement of Undisputed Facts ¶ 29). On September 13, 2007, Burton's formal charge was filed (v1: 291), and in November of 2008, the Commission issued her a notice of right to sue. Id. at 285.

3. District Court's Decision

The district court granted defendant's motion for summary judgment on plaintiff's claim that she was subjected to a sexually hostile work environment

because of Duckworth's harassment. The court held that NEI was "entitled to summary judgment in its favor on Ms. Burton's claim of sexual harassment" based on the "Ellerth/Faragher defense." v2: 492 (Order at 4). Under that defense, the court explained, an employer will not be found vicariously liable for a supervisor's sexual harassment of a subordinate that does not result in a tangible employment action if the employer "can show (1) that it exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer to avoid harm otherwise." v2: 489-90 (Order at 1-2 (citing Pinkerton v. Colorado Dep't of Transp., 563 F.3d 1052, 1059 (10th Cir. 2009) (citing Faragher, 524 U.S. at 807, and Ellerth, 524 U.S. at 765))).

According to the district court, NEI met its burden under both prongs of this test. In the court's view, the first prong of the defense was satisfied because "it is undisputed that [NEI] had a policy prohibiting the sort of conduct that Mr. Duckworth allegedly engaged in; that the policy instructed employees to report such conduct to the company;" and that Burton was aware of the policy. v2: 490 (Order at 2). In addition, the court noted, after plaintiff complained to HR that Rowell had grabbed her arm, HR conducted an investigation and fired Rowell, and, after NEI's president was informed of Duckworth's harassment, he directed that HR investigate the complaint. v2: 490-91 (Order at 2-3). Since Duckworth then

left the company, however, "there was nothing more for [the company] to do to alleviate any of the alleged harassment." Id. at 491 (Order at 3).

The court found that NEI also satisfied the second Faragher/Ellerth prong because, according to the court, "it is undisputed that Burton . . . never reported the alleged sexual harassment by Mr. Duckworth to Noble Energy." According to the court, the company learned of the harassment only because a contractor reported it to NEI's president. v2: 491 (Order at 3). The court rejected Burton's explanation that she did not report Duckworth because of fear of retaliation, stating that "'a generalized fear of retaliation simply is not sufficient to explain a long delay [or a failure, in Ms. Burton's case] in reporting sexual harassment.'" Id. at 491-92 (Order at 3-4) (quoting Pinkerton, 563 F.3d 1052, 1059 (10th Cir. 2009)).

Alternatively, the court held, summary judgment was appropriate because plaintiff failed to "exhaust her administrative remedies" on the harassment claim. The court held that the Intake Questionnaire, filed on July 27, 2007, did not constitute a charge "because it cannot reasonably be construed as a request for remedial action by the [Commission]." v2: 492 (Order at 4). Moreover, the court stated, the EEOC's letter of August 6 referring to a "potential charge" demonstrates that the Commission likewise did not construe the Intake Questionnaire as a request for remedial action. Id. Because Burton's formal charge was not filed until September 12, more than 300 days after Duckworth's

last day in the office, the court found that she did not file a timely charge. v2: 492-93 (Order at 4-5).

In any event, the court concluded, plaintiff identified September 12, 2006, as the "main day" of Duckworth's harassment. That day, the court noted, would be outside the 300-day charge-filing period even if the July 27 Questionnaire were considered a charge. Although Burton alleges that Duckworth's conduct was "continuous, discriminatory, harassing and retaliatory," the court stated, "a plaintiff may only pursue a claim based on actions that occurred outside the 300-day filing period when the pre- and post-limitations incidents involve the same type of employment actions, when those actions occurred relatively frequently, and when they were perpetrated by the same managers." v2: 493 (Order at 5) (citing Duncan v. Denver Dep't of Safety, 397 F.3d 1300, 1310 (10th Cir. 2005)). In the court's view, Burton "presented no evidence that these criteria are met here." Id.[2]

STANDARD OF REVIEW

This Court reviews the grant of summary judgment de novo. Harrison v. Eddy Potash, 248 F.3d 1014, 1021 (10th Cir. 2001). Summary judgment is appropriate only if the admissible evidence shows that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. Id.; Fed. R. Civ. P. 56. In determining whether that standard is met, courts must

[2] The court also granted summary judgment on plaintiff's retaliation claim. v2: 493-97 (Order at 5-8). We take no position on this largely factual issue.

"examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." Abercrombie v. City of Catoosa, 896 F.2d 1228, 1230 (10th Cir. 1990). Where the moving party also bears the burden of proof on an issue of law, summary judgment is inappropriate unless no reasonable jury could have found against the party on that issue. See Cadena v. Pacesetter Corp., 224 F.3d 1203, 1208 (10th Cir. 2000) (discussing judgment as a matter of law). Cf. Reeves v. Sanderson Plumbing Prods., 530 U.S. 133, 150 (2000) (noting that "standard for granting summary judgment 'mirrors' the standard for judgment as a matter of law").

ARGUMENT

I. THE EVIDENCE DOES NOT COMPEL A FINDING THAT DEFENDANT ESTABLISHED ITS FARAGHER/ELLERTH DEFENSE.

To make out a claim for hostile work environment harassment under Title VII, there must be evidence that the plaintiff was subjected to unwelcome sexual harassment that was sufficiently severe or pervasive, both objectively and subjectively, to create a hostile or abusive work environment, and that there is some basis for holding the employer liable for this conduct. See Harris v. Forklift Sys., 510 U.S. 17, 21 (1993) (listing elements of claim); see generally Faragher, 524 U.S. 775 (discussing possible bases for employer liability). In this case, defendant does not dispute that plaintiff was subjected to actionable harassment by Mack Duckworth, a high-level manager and, often, her direct supervisor.

Defendant does, however, dispute that it should be held liable for the harassing conduct.

In Faragher v. City of Boca Raton, 524 U.S. at 807, the Supreme Court held that an employer is "subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." See also Burlington Indus. v. Ellerth, 524 U.S. 742, 765 (1998). Where no "tangible employment action" has been taken, however, the employer may establish "an affirmative defense to liability or damages" by proving both that (1) the employer "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that (2) the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." Faragher, 524 U.S. at 807; accord Ellerth, 524 U.S. at 765. Because this is an affirmative defense, the defendant bears the burden of proving both prongs by a preponderance of the evidence, and summary judgment must be denied if a reasonable jury could find against the company on either prong. See Cadena v. Pacesetter Corp., 224 F.3d 1203, 1208 (10th Cir. 2000); Harrison v. Eddy Potash, 248 F.3d 1014, 1027 (10th Cir. 2001) (stating that judgment for defendant is warranted only if "the evidence points but one way and is susceptible to no reasonable inferences supporting the party opposing the motion").

The Faragher Court explained that an employer may typically carry its burden on the first Faragher/Ellerth prong by demonstrating that it has an anti-harassment policy with which employees and management alike are familiar and a "proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense." See Faragher, 524 U.S. at 806-08. Then, assuming the employer has such a policy and enforcement mechanism, the employer typically may carry its burden on the second prong by proving that the plaintiff, without adequate justification, did not avail herself of the employer's preventive or remedial apparatus. Faragher, 524 U.S. at 806-07.

In accordance with this standard, this Court has held that a jury reasonably rejected an employer's Faragher/Ellerth defense where the plaintiff complained repeatedly to one supervisor about harassment by another supervisor, but no remedial action was taken until after she resigned; the supervisor to whom she complained simply shrugged off her complaints, saying that the harasser would never be fired because he made too much money for the company. See Cadena, 224 F.3d at 1206-07. Similarly, this Court reversed a summary judgment on the employer's affirmative defense where the plaintiff complained repeatedly to the office manager and general manager about harassment by her immediate supervisor, but, despite half-hearted remedial action, the harassment did not stop.

Curran v. AMI Fireplace Co., 163 Fed. Appx. 714, *721-22 & n.6 (10th Cir. Jan 19, 2000) (unpublished) (adding that, in light of the existence of a factual issue on the first prong, Court need not address the second prong or the fact that the plaintiff did not complain to HR, in accordance with anti-harassment policy). See also Wilson v. Tulsa Jr. College, 164 F.3d 534, 541 (10th Cir. 1998) (finding jury question on adequacy of evidence on first prong inter alia where policy did not explain how supervisor should handle informal harassment complaints). Compare Pinkerton v. Colorado Dep't of Transp., 563 F.3d 1052, 1062 (10th Cir. 2009) (finding employer established Faragher/Ellerth defense where employer had effective anti-harassment policy and complaint procedure and trained employees in both, but plaintiff, without explanation, failed to complain).

Similarly, here, a reasonable jury could reject NEI's Faragher/Ellerth defense in light of evidence that, despite plaintiff's complaints to three management officials, NEI took no prompt remedial action to end Duckworth's alleged harassment. Specifically, under NEI's Code of Business Ethics and Conduct, employees are to "report" perceived Code violations (implicitly including sexual harassment) to "appropriate personnel." v1: 205. Burton testified without contradiction that, beginning shortly after Duckworth started harassing her, she complained to her supervisor, Kim Rowell, and to the district manager, Steve Wendte; at Rowell's direction, she also complained to the accounting manager, Pat

Beck. See v2: 369-73, 392-93. A jury could easily find that all of these individuals are "appropriate personnel" within the meaning of the Code, but there is no evidence that any of them took any remedial action in response to Burton's complaints. Indeed, when Burton asked Wendte whether he would inform HR of the conduct, he initially stated that he would but then admitted that "the situation" was "difficult to handle . . . because [Duckworth] was his boss's boss." v2: 372; see also v1: 152 (describing remedial procedure as "hazy").

In light of this evidence, a reasonable jury would not be compelled to find either that NEI took reasonable steps to prevent and promptly correct the harassment Burton experienced or that Burton unreasonably failed to complain. The district court's contrary conclusion — that "undisputed" evidence establishes that "Noble Energy exercised reasonable care to prevent and promptly correct any sexually harassing behavior" and that "plaintiff unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise" (v2: 490, 492) — is based on a faulty and selective reading of the record. The court found that, whereas Burton complained to HR about Rowell's conduct, "it is undisputed" that she "never reported the alleged sexual harassment by Mr. Duckworth to Noble Energy." v2: 491. This finding simply ignores the unrebutted evidence of her complaints to her supervisor and other NEI officials.

Moreover, insofar as the court's reference to the fact that Burton had complained to HR about Rowell suggests that the court believed that she was required to do so with respect to Duckworth, the court erred. As noted above, NEI's Code does not require employees to complain to HR; it merely directs that they report perceived Code violations to "appropriate personnel." v1: 205. This, a reasonable jury could find, Burton did, by complaining to her supervisor, the accounting manager, and the district manager. Moreover, there is evidence that, because she accompanied Duckworth on numerous trips to Velma, Anna Rodriguez (the HR employee that Burton consulted about her problems with Rowell) would have observed at least some of Duckworth's alleged harassing behavior, yet nothing suggests that Rodriguez made any effort to rein him in. See, e.g., v1: 153-53 (noting, e.g., that Rodriguez laughed when Duckworth suggested that they were staying the same hotel room); v2: 370-71 (noting that Rodriguez often accompanied Duckworth), 376-77 (noting Rodriguez's presence during public hugging).

In any event, even if Burton could have gone to HR, the Court should not hold that an employer is off the hook if a plaintiff fails to continue complaining up the chain of command if her original complaints — going as high as a district manager — yield no results. See Gorzynski v. JetBlue Airways Corp, 2010 WL 569367, at *10 (2d Cir. Feb 19, 2010) (Faragher/Ellerth does not require that

harassment victims "go from manager to manager until they find someone who will address their complaints"). This Court has held that "an employer is obligated to respond to harassment of which it actually knew or in the exercise of reasonable care should have known, and that [a]ctual knowledge will be demonstrable in most cases where the plaintiff has reported harassment to management-level employees." Wilson, 164 F.3d at 542 (citation omitted). Here, assuming the jury credits Burton's testimony that she complained, NEI should be charged with actual knowledge of the harassment from shortly after it began. [3]

[3] In Lauderdale v. Texas Dep't of Criminal Justice, 512 F.3d 157, 164-65 (5th Cir. 2007), the Fifth Circuit stated that, while there may be exceptions, "[i]n most cases . . . once an employee knows his initial complaint is ineffective, it is unreasonable for him not to file a second complaint, so long as the employer has provided multiple avenues for such a complaint." The Lauderdale court concluded that a corrections officer acted unreasonably when she complained to her immediate supervisor but then ignored his advice to contact the warden and, even though the anti-harassment policy listed "numerous avenues for reporting sexual harassment," the plaintiff made no further complaints until after she resigned. Insofar as this decision can be read to impose a general rule that it is virtually always unreasonable for a victim of harassment to stop complaining after her complaints have been ignored, this Court should not follow it. Questions of reasonableness are not well-suited to even qualified per-se rules but rather invite a case-by-case assessment and raise factual issues for the jury; this is particularly so where, as here, the employer bears the burden of proof. Furthermore, the facts of this case are very different from those in Lauderdale. Unlike the plaintiff in Lauderdale, Burton did make "a second complaint" — and, indeed, a third. She also followed her supervisor's advice in complaining to Beck, but no remedial action resulted from any of these complaints. And, unlike the harassment policy in Lauderdale, NEI's "policy" had no specific procedures for handling harassment complaints but simply directed employees to report to "appropriate personnel" — which Burton did. Finally, to the extent a plaintiff must continue to complain in attempting to stop harassment, summary judgment for the employer should

The district court also stated that Burton's stated fear of retaliation if she complained about Duckworth could not excuse any failure to complain, reasoning that "'a generalized fear of retaliation is not sufficient to explain a long delay [or a failure, in Ms. Burton's case] in reporting sexual harassment.'" Order at 4 (citing Pinkerton, 563 F.3d at 1063 (10th Cir. 2009) (brackets in original)). In Pinkerton, this Court noted that, while complaining about harassment can be "uncomfortable for the employee," allowing "subjective ungrounded fears of unpleasantness and retaliation" to alleviate a reporting requirement would undermine Title VII's enforcement scheme. Pinkerton is distinguishable from this case, however, not only because, unlike Burton, the plaintiff there never complained at all, but also because, unlike Burton, the plaintiff in Pinkerton was never threatened with discharge if she did complain. Nor would a jury be required to find that Burton was unreasonable in crediting Duckworth's threats since, because of Duckworth's rank, Steve Wendte, the district manager, was openly reluctant to convey her complaint to HR or to take any other action himself. v2: 372. In light of this evidence, a jury could find that Burton's fear cannot fairly be characterized as

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ordinarily be improper on the first prong of the Faragher/Ellerth defense because an employer with an effective policy and enforcement mechanism would normally be expected to address alleged harassment after the first complaint. Cf. Curran, 163 Fed. Appx. at *721-22 (not reaching second prong even though plaintiff did not exactly follow employer's complaint procedure where she made repeated complaints to managers but no effective remedial action was taken).

merely a "generalized" "subjective ungrounded fear of unpleasantness and retaliation."

II. PLAINTIFF EXHAUSTED HER ADMINISTRATIVE REMEDIES WITH RESPECT TO HER CLAIM OF SEXUAL HARASSMENT BY DUCKWORTH.

To pursue a Title VII claim in court, a plaintiff must first file a "charge" with the Commission within 300 days of the alleged discriminatory conduct she plans to challenge. 42 U.S.C. § 2000e-5(e)(1). For a document to constitute a charge, it must, at a minimum, be in writing, identify the parties and describe the complained-of action or practice with sufficient precision to allow the Commission to begin an investigation. See 29 C.F.R. §§ 1601.9, 1601.12. In addition, the document must "be reasonably construed as a request for the Commission to take remedial action to protect the employee's rights or otherwise to settle a dispute between the employer and the employee." Federal Express Corp. v. Holowecki, 552 U.S. 389, 402 (2008). Assuming these requirements are met, factual omissions or technical defects, such as the failure to verify the charge, may be cured outside the 300-day charge-filing period, and the amended charge will relate back to the date the charge was first received. 29 C.F.R. § 1601.12(b); see Edelman v. Lynchburg College, 535 U.S. 106, 109-10, 119 (2002) (discussing unverified letter and finding that EEOC's regulation allowing for relation back constitutes an "unassailable interpretation" of Title VII).

Both the statute and EEOC's regulations also require that the agency notify the employer that a charge of discrimination has been filed "within ten days" of its receipt. 42 U.S.C. § 2000e-5(b); 29 C.F.R. § 1601.14. Whether "a filing is deemed a charge" does not turn on whether the Commission in fact has sent timely notice to the employer since it "would be illogical and impractical to make the definition of charge dependent upon a condition subsequent over which the parties have no control." Holowecki, 552 U.S. at 404. However, the Commission does not serve notice on the employer until it has a document deemed to constitute a minimally sufficient charge. Even then, the agency does not call for a response from the employer until a verified charge — typically, a completed EEOC Form 5 — has been filed. See Edelman, 535 U.S. at 115.

Applying those standards here, it is clear that Burton filed a Title VII charge with the Commission by early August 2007. It is undisputed that on July 27, 2007, Burton submitted an Intake Questionnaire including allegations of sexual harassment. The Commission then followed up and, on August 8, 2007, served a "Notice of Charge of Discrimination" on NEI stating that an "unperfected charge," alleging discrimination on the basis of sex in violation of Title VII, had been filed against the company. v1: 72 (Def's Statement of Undisputed Facts ¶ 29). The Notice adds that the Commission is "working to perfect the formal writing of the charge," and defendant need take no action until it receives "a copy of the

perfected charge." Id.; see also v1: 292 (Notice of Charge); id. at 283 (investigator's log noting "unperfected charge" on 8/8/07). This "unperfected charge" was filed within 300 days of Duckworth's November 10 departure from the company, and Burton testified that the harassment was ongoing until that time. The "perfected charge," formalized on an EEOC Form 5, was then completed on September 13, and, under Edelman, relates back to previous filing for charge-filing purposes. See also v1: 291 (completed EEOC Form 5); id. at 289 (follow-up 9/14/2007, Notice of Charge).

This undisputed evidence establishes that Burton "exhausted her administrative remedies" with respect to her harassment claim. As this Court has explained, Title VII's "exhaustion" requirement serves "two main purposes": to give the employer notice of an alleged violation and to provide the Commission with an opportunity to conciliate the claim. See Jones v. UPS, 502 F.3d 1176, 1185 (10th Cir. 2007). Because it set in motion the Commission's enforcement mechanism, the initial "unperfected charge" and the subsequent "perfected" charge clearly satisfied those purposes. NEI received notice in early August that a Title VII sex discrimination charge had been filed against the company, and the Commission had an opportunity to conciliate the claim.

In ruling that Burton did not "exhaust her administrative remedies" (Order at 4-5), the district court overlooked the evidence that NEI was notified that an

"unperfected charge" had been filed. Instead, the court focused exclusively on the Form 5, filed on September 13, and the Intake Questionnaire, filed on July 27. In the court's view, the Form 5 was ineffective because it was filed more than 300 days after the last possible harassing act by Duckworth in November 2006, and the Intake Questionnaire was not a charge because, in the court's view, it could not "be reasonably construed as a request for remedial action by the agency," nor did the Commission construe it as one. v2: 492-93 (noting EEOC letter to Burton referencing her "potential charge").

The district court's finding that Burton's September 13 charge was untimely fails to recognize that the charge related back to the earlier unperfected charge. This Court should therefore find instead that Burton satisfied Title VII's exhaustion requirements with respect to her sexual harassment claim.

Finally, the district court erred in holding that plaintiff could not challenge the alleged sexual harassment by Duckworth because, even assuming a timely charge covering some conduct had been filed, the "main day" of September 12 fell outside the charge-filing period, and plaintiff failed to show that the "pre- and post-limitations incidents" were sufficiently related in terms of type, frequency, and perpetrator. See v2: 493. While it is not entirely clear, we presume the court concluded that the incidents occurring within 300 days of any charge were trivial, standing alone, and were also unrelated to more serious conduct occurring outside

the charge-filing period. If so, the court's analysis is simply wrong. In fact, properly analyzed, the evidence supports a finding that all of the alleged harassing incidents are part of a single "unlawful employment practice."

Where, as here, a plaintiff is challenging an alleged sexually hostile work environment, she must file her charge within 300 days of at least one act of harassment. If she does so, she may challenge all of the conduct encompassed in the same "unlawful employment practice." See National R.R. Passenger Corp. v. Morgan, 536 U.S. 101, 109, 117 (2002). The key inquiries for purposes of determining which acts are time-barred and which are not are "whether the acts about which an employee complains are part of the same actionable hostile work environment and, if so, whether any act falls within the statutory [filing] time period." Id. at 120. In making that determination, it may be helpful to consider, inter alia, the identity of the harasser and the nature of alleged behavior. See id.; Duncan v. Denver Dep't of Safety, 397 F.3d 1300, 1309 (10th Cir. 2005).

Here, considering those and other factors, a jury could easily find that all of the alleged harassing conduct constitutes a single "unlawful employment practice" within the meaning of Morgan. The only alleged harasser was Mack Duckworth. Burton alleges that, whenever he came to the office, he caressingly hugged her and other female employees and sometimes touched her in other ways. He also made inappropriate comments and asked inappropriate questions about her and other

women over the phone, by email, by text message and in person. When she complained to him, he asserted his authority as "boss," saying that she should listen and/or answer his questions, however improper. Plaintiff alleges that this conduct continued into October and November of 2006, until Duckworth left the company. Thus, because the latter incidents occurred within 300 days of plaintiff's August 8 charge and contribute to her claim, the entire time period from late fall 2005 until the fall of 2006 may be considered in determining liability. See Morgan, 536 U.S. at 117 ("Provided that an act contributing to the claim occurs within the filing period, the entire time period of the hostile environment may be considered by a court for the purposes of determining liability."). This would include the "team-building" trip and ensuing football game on the "main day" of September 12 since, while it was more egregious than the other conduct, that conduct nevertheless consisted of touching, improper comments and inappropriate questions.

The district court's contrary ruling applies an improper legal standard. Specifically, in rejecting the plaintiff's harassment claim, the court reasoned that "a plaintiff may only pursue a claim based on actions that occurred outside the 300-day filing period when the pre- and post-limitations incidents involve the same type of employment actions, when those actions occurred relatively frequently, and

when they were perpetrated by the same managers." v2: 493 (citing Duncan, 397 F.3d at 1310).

Initially, we note that, although the district court did not explain its reasoning, the alleged behavior, described above, would meet even a "strict type, frequency, and perpetrator" standard. More importantly, however, this Court squarely rejected such a standard in Tademy v. Union Pacific Corp., 520 F.3d 1149, 1160-61 (10th Cir. 2008) (neither Duncan nor Tenth Circuit requires a "strict type, frequency and perpetrator test"). The Tademy Court concluded that the repeated incidents of highly offensive graffiti, slurs, and the appearance of a noose alleged in that case could all be considered part of a single racially hostile work environment claim even though the only incident within the charge-filing period was the noose, and despite the fact that the incidents varied by type, spanned more than ten years, and may have been perpetrated by different individuals. See id. See also Morgan, 536 U.S. at 120-21 (finding that conduct including racial jokes, racially derogatory acts, racial epithets, and negative comments regarding blacks' capacity to be supervisors, mostly occurring outside the charge-filing period and perpetrated by various managers, could be part of the same actionable hostile environment claim). Compare Duncan, 397 F.3d 1300 (refusing to find that harassment occurring over twenty years in six different locations, perpetrated by both peers and superiors, and, consisting of conduct ranging from rumors, to

touching, to sexual pictures, letters and comments, and to ostracism can be considered one unlawful employment practice).

Significantly, the incidents of harassment about which Burton complains are much more closely related than those in either Tademy or Morgan. Moreover, a jury could find that all of the incidents contributed to the creation of a hostile and abusive working environment for Burton. Because the district court's crabbed analysis is both legally and factually infirm, its decision should not stand. Instead, we urge this Court to reverse the summary judgment granted to defendant on the sexual harassment claim and allow this claim to proceed to trial.

CONCLUSION

For the foregoing reasons, the decision of the district court granting summary judgment to defendant on plaintiff's sexually hostile work environment claim should be reversed.

Respectfully submitted,

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I certify that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 6377 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

I further certify that this brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Times New Roman font, 14 point type.

Dated: March 8, 2010

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Barbara L. Sloan

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I certify that on March 8, 2010**,** I electronically transmitted the foregoing document to the Clerk of Court using the ECF System for filing. Based on the record currently on file, the Clerk of Court will transmit the Notice of Electronic Filing to the following ECF registrants:

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